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No. 01-1433

Supreme Court, U.S.
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In The

Supreme Court of the United States

EDWARD J. FOLEY, SR.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN'S BRIEF IN OPPOSITION

LAURANCE E. BACCINI
Counsel of Record
GLEN A. WEINER, ESQUIRE
ADAM E. LAVER, ESQUIRE
KLEHR, HARRISON, HARVEY, BRANZBURG and ELLERS, LLP
260 South Broad Street
Philadelphia, PA 19102-5003
(215) 568-6060

Counsel for Respondent, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

When a Federal Court of Appeals reviews an ERISA § 502(a)(1)(B) partial denial of benefits claim under an arbitrary and capricious standard of review, may it reverse the District Court's conclusion that the Trustees acted in an arbitrary and capricious manner, which the District Court specifically rejected, and which was not cross appealed by Petitioner to the Court of Appeals, with a rationale that was not argued by the Petitioner before the Court of Appeals?

When a Federal Court of Appeals indicates, in a footnote in another case, that it will follow the decisional law enunciated by several other courts of appeal, does a conflict in the various circuits arise within the meaning of Rule 10(a) of the Rules of the Supreme Court of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner

Edward J. Foley, Sr.

Respondent

International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

Other Parties

The International Brotherhood of Electrical Workers Local 98; Trustees John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link, William Rhodes, Roy Dantz and Larry Bradley and Union Officers John J. Dougherty, Edward Neilson and Fred Compton were parties to the proceedings below and have no legal interest in the outcome of this Petition for a Writ of Certiorari.

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ARGUMENT

Respondent, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan, respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the judgment filed in this case because petitioner waived the issue presented for review – post hoc rationalization – and because he fails to make out a case for a Writ of Certiorari under Rule 10(a).

STATEMENT OF THE CASE

Rule 15 of the Rules of the Supreme Court of the United States, entitled Briefs in Opposition; Reply Briefs; Supplemental Briefs, provides at Paragraph 2 as follows:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

The treatment of the case below raises the issue of waiver. The Petitioner's Brief contains certain citations to the opinions of the District Court but the quoted material

cited as support does not support statements set forth on the pages of the Petition for a Writ of Certiorari.

The following constitutes misstatements of the opinions of the lower Court that are relevant to this Court's decision with respect to the issues raised in this opposition:

MISSTATEMENT- Petitioner's Brief	PAGE CITATION
"The petitioner, Edward J. Foley, Sr., . . . suffered a break in service in 1973 and forfeited 12 and half [sic] years of credited service. . . . . (App. D, at pp. 75a-76a)".	This citation to the record does not support the language appearing on page 2 at lines 6 through 10 of the Petition for a Writ of Certiorari.
"[M]ailed a letter to Plan [sic] alleging that Foley 'may have . . . misled or misinformed the Trustees' with respect to the restoration of his pension credits. *The Plan reviewed this matter for a second time and found that the accusations were baseless and groundless.* (App. D, pp. 77a, 81a-82a, note 2)" (emphasis added).	This citation to the record does not support the language appearing on page 2 at lines 16 through 21 of the Petition for a Writ of Certiorari.

"In the report Foley was compared to the 21 other individuals who had ever applied for the exception to the break in service rule and the Trustees found Foley to be similarly situated to these 21 individuals. (App. D, at pp. 78a, 81a, App B, at pg. 37a, note 12)".	This citation to the record does not support the language that appears on pages 2 through 3 at page 2, line 27 through page 3, line 5 of the Petition for a Writ of Certiorari.
"Initially, Plan Counsel argued that the Trustees were entitled to treat Foley differently than all other plan participants merely because unsubstantiated allegations were raised against him. (App. B at pg. 38a, note 14)".	This citation to the record does not support the language appearing on page 3 at lines 13 through 18 of the Petition for a Writ of Certiorari.
"The District Court rejected plan counsels arguments that ran contrary to the Trustees testimony and documents introduced into evidence and instead accepted the Trustees testimony that they believed in good faith that they treated Foley the same as all other plan participants. (App. D, at pg. 82a)".	None of the language set forth on page 4 at lines 8 through 13 of the Petition for a Writ of Certiorari is supported by the citation to the record.

"Because the Trustees held Foley to a higher evidentiary standard than any other Plan participant who had sought refuge under the exception to the break in service rule the District Court found that the Trustees arbitrarily and capriciously denied Foley pension benefits and ordered the pension credits reinstated. (App. D, at pp. 80a, 85a, 87a, 88a)."	There is no mention of arbitrariness and capriciousness on pages 80a, 85a or 88a, and this cannot support the language set forth on page 4 at lines 13 through 19 of the Petition for a Writ of Certiorari.

WAIVER

This Court previously explained what "waiver" is with respect to issues that are sought to be brought before the Court as follows:

> "Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon [by the court] below'." *United States v. Williams*, 504 U.S. 36, 41 (1992).

It is beyond doubt that the Court of Appeals never "passed upon" the issue of post hoc rationalization as that principle is enunciated in Petitioner's Brief submitted in this case. Indeed, the court's opinion is completely devoid of the term. See Appendix A to Petition for a Writ of Certiorari.

It is submitted that the Petitioner never effectively pressed for a resolution of its post hoc rationalization

theory at any stage of these proceedings. In the District Court, plaintiff asserted that the decision of the United States Court of Appeals for the Seventh Circuit in *Matuszak v. Torrington Co.*, 927 F.2d 320 (7th Cir. 1991) (footnote 10) supported plaintiff's "new reason" argument resulting in an obligation on the part of the District Court to apply a *de novo* review to the claims made by plaintiff. The District Court rejected this argument for two reasons. The first reason was, as a factual matter, that the Trustees had not advanced plaintiff's alleged misconduct as the reason for which his benefits were denied. The second reason was that a failure to adopt misconduct as a justification for denying benefits would not constitute a new reason on the part of the Trustees. The District Court ruled against the plaintiff's claims when it argued that defendants had raised allegations of plaintiff's misconduct as a new reason for denying him benefits. This reason was not set forth in any of the prior denial-related correspondence with the Trustees. (App. B at pp. 34a-35a). On appeal, after the District Court entered its verdict in plaintiff's favor, plaintiff did not cross-appeal the District Court's failure to adopt its "new reason" argument. In its counterstatement portion of its Brief, plaintiff stated that Appellants changed their defense theory several times but, when it came to the argument section of the Brief, this subject was completely abandoned.

Plaintiff filed a Petition for Rehearing and for Rehearing *en banc* on November 21, 2001. As grounds in support of the petition, plaintiff asserted that the decision of the United States Court of Appeals for the Third Circuit sets up a needless conflict with all other circuits that

have ruled on the issue of whether post hoc rationalization is permissible in an ERISA § 502(a)(1)(B) claim for benefits, taking a position contrary to the authoritative opinions of the Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

Plaintiff should not have couched his Petition for Rehearing in this fashion since he failed to argue the substance of it before the Court of Appeals. While he argued the issue of post hoc rationalization before the Court of Appeals for the Third Circuit, he did so only in his Petition for Rehearing and not in his main argument before the court. It was erroneous for plaintiff to have characterized the Third Circuit's action as setting up a needless conflict with all other Circuits that have ruled on this issue. The Third Circuit had already ruled favorably with respect to the issue of post hoc rationalization. Under these circumstances, the *Foley* decision sets up no conflict with other circuits and Plaintiff's failure to properly press the issue of post hoc rationalization is obvious.

RULE 10(a)

Rule 10 of the Rules of the Supreme Court of the United States provides that "a petition for a writ of certiorari will be granted only for compelling reasons." The reason ascribed by the Petitioner is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

The matter with which the decision of the United States Court of Appeals for the Third Circuit is alleged to

conflict is the principle of law entitled "post hoc rationalization." This principle, said to have been adopted by the Second, Sixth, Eighth, Ninth and Tenth Circuits constitutes a body of law with which the decision of the Court of Appeals for the Third Circuit in the instant case is in conflict. Previously, even the Court of Appeals for the Third Circuit stated its acceptance of the principle of post hoc rationalization when it affirmed that principle of law in footnote 8 of its decision in *Skretvedt v. E.I. Dupont De Nemours and Co.*, 268 F.3d 167 (3d Cir. 2001). Petitioner asserts that because the panel in the instant case did not follow footnote 8 in the *Skretvedt* case, that constitutes a "conflict with the decision of another court of appeals on the same matter."

No conflict among circuits exists. It is true that the *Foley* case as decided by the Court of Appeals does not implicate the post hoc rationalization analysis. But this is because this type of analysis was not argued before the Court of Appeals and because a review was confined to whether the Trial Court properly applied an arbitrary and capricious review of the Trustees' decision. Indeed, the *Foley* case was not viewed by any member of the court as a post hoc rationalization case as Petitioner did not bring it to the court's attention during briefing and oral argument. Since the court was on record as endorsing the concept as post hoc rationalization, the "conflict" basis for granting the Petition for Rehearing was eliminated.

CONCLUSION

It is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

LAURANCE E. BACCINI
Counsel of Record
GLEN A. WEINER, ESQUIRE
ADAM E. LAVER, ESQUIRE
KLEHR, HARRISON, HARVEY,
BRANZBURG AND ELLERS, LLP
260 South Broad Street
Philadelphia, PA 19102-5003
(215) 568-6060

Counsel for Respondent, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan